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THE FOURTH AMENDMENT WARRANT REQUIREMENT IN THE ENVIRONMENTAL LAW CONTEXT: CAN IMMINENT HARM TO THE ENVIRONMENT JUSTIFY A WARRANTLESS SEARCH?

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I. INTRODUCTION

It is 10:00 p.m. You, a diligent investigator employed with your state's office of environmental protection, have decided to remain at the office this evening to catch up on some paperwork. At 10:05 p.m., the telephone rings and a reliable informant tells you that a trailer heavily laden with toxic chemicals will be departing from a local warehouse sometime between tonight and tomorrow morning.[1] The transport, according to the informant, was arranged hastily by the warehouse operator upon his discovery that the warehouse was scheduled for inspection by your office tomorrow afternoon.

Alarmed by the call, you thank the informant and immediately telephone the local fire department to arrange for surveillance of the warehouse. You offer to participate in the surveillance, and during your shift you observe workers loading fifty-five gallon drums onto a trailer. You watch as a tractor attaches the trailer and exits the premises.

You follow the tractor-trailer for several miles, reasonably sure that the trailer contains hazardous chemicals, but unsure whether the drums containing those chemicals have been secured properly. The

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[1] The facts of this hypothetical are drawn loosely from Ohio v. Denune, 612 N.E.2d 768, 770–71 (Ohio Ct. App. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

tractor-trailer proceeds down a bumpy dirt road. You envision those fifty-five gallon drums sliding around in the trailer, careening into one another. Your concern about a possible toxic release multiplies with every bump. The tractor-trailer finally parks in a lot filled with other trailers. The driver detaches the trailer, and departs in the tractor. Overwhelmed now by the thought that hazardous toxins could at that very moment be leaking from the fifty-five gallon drums, you approach the lot to take a look inside the trailer.

Question: if you look inside the newly arrived trailer, are you effectuating an illegal search, in violation of the Fourth Amendment to the United States Constitution?[2] After all, you have no search warrant.[3] But if you act soon, you may be able to prevent or control a dangerous toxic leak. Given the circumstances, should you look inside the trailer?

The Fourth Amendment protects against "unreasonable" searches and seizures, and guarantees that no search warrants will issue without probable cause.[4] The United States Supreme Court has determined that searches conducted without a warrant that do not fall into a recognized exception to the warrant requirement are *per se* unreasonable.[5] There are, however, at least six exceptions to the warrant requirement.[6] One such exception exists where authorities proceed upon requisite probable cause, but are prevented by exigent circumstances from obtaining a warrant prior to a criminal search.[7]

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[2] The Fourth Amendment protects against unreasonable searches and seizures, and guarantees that no warrants will issue, except upon probable cause. *See* U.S. CONSTITUTION, amend. IV.

[3] The United States Supreme Court has interpreted the Fourth Amendment as requiring a search warrant for all criminal searches that do not fall under one of a narrow set of exceptions. *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); Jacqueline J. Warner, Note, *The Exigent Circumstance Exception to the Warrant Requirement of the Fourth Amendment: What Criteria Must Be Met?*, 33 How. L.J. 425, 425–26 (1991).

[4] U.S. CONSTITUTION, amend. IV.

[5] *Mincey*, 437 U.S. at 390 (quoting *Katz*, 389 U.S. at 357); *see also* Warner, *supra* note 3, at 425–26.

[6] *See* New York v. Burger, 482 U.S. 691, 699–703 (1987) (no warrant required if pervasively regulated industry); United States v. Robinson, 414 U.S. 218, 235 (1973) (no warrant required if search conducted incident to a lawful arrest); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (no warrant required if search authorized by voluntary consent); Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971) (no warrant required if seizing items in plain view); McDonald v. United States, 335 U.S. 451, 455–56 (1948) (warrant requirement will not be excused where no exigent circumstances exist); Carroll v. United States, 267 U.S. 132, 153 (1925) (no warrant required if searching an automobile). For detailed treatment of each exception, see Project, *The Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1991–1992*, 81 GEO. L.J. 877, 877–952 (1993) [hereinafter Annual Review].

[7] *See McDonald*, 335 U.S. at 456. The term "exigent circumstances" has come to encompass a varied array of situations which will be discussed in Sections II and III, *infra* of this Comment.

This Comment explores whether the threat of imminent harm to the environment qualifies as an exigency that could validate a warrantless search.[8] Section II provides a basic overview of the Fourth Amendment warrant requirement. Section III reviews the contours of the exigent circumstances exception to the warrant requirement, focusing on those cases where the exigency was imminent danger of some sort. Section IV outlines the Supreme Court and lower federal court decisions that have developed the exigent circumstances exception, and summarizes in detail two state court opinions that have discussed imminent harm to the environment as a potential exigent circumstance. Section V discusses current attitudes of the judicial and legislative branches towards preventing imminent harm to the environment. Finally, Section VI assesses the feasibility of expanding the exigent circumstances exception to encompass efforts to prevent imminent environmental harm.

II. THE FOURTH AMENDMENT WARRANT REQUIREMENT

The Fourth Amendment protects individual interests in privacy against unjustified intrusions by law enforcement officials.[9] Before finding the Fourth Amendment applicable in a given case, a court must decide that an individual or business has an expectation of privacy that society is prepared to recognize as valid.[10] Where a valid privacy interest exists, the Fourth Amendment provides protection through both the reasonableness clause and the warrant clause.[11] The reasonableness clause mandates that all searches be reasonable.[12] The warrant clause guarantees that no search warrants will issue except upon probable cause.[13]

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[8] Although there exist several other exceptions to the Fourth Amendment warrant requirement which might be applied in a given case, the scope of this Comment is limited to the application of the exigent circumstances exception.

[9] Donna Mussio, Note, *Drawing the Line Between Administrative and Criminal Searches: Defining the "Object of the Search" in Environmental Inspections*, 18 B.C. ENVTL. AFF. L. REV. 185, 187 (1990). The Fourth Amendment was written largely in response to eighteenth-century British writs of assistance that permitted searches unlimited in scope, without judicial supervision, and without probable cause. *Id.* at 187 n.12.

[10] *Id.* at 187 n.13.

[11] *Id.* at 187. See U.S. CONSTITUTION, amend. IV, which states "[t]he right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."

[12] *See* U.S. CONSTITUTION, amend. IV.

[13] *Id.*

The United States Supreme Court has interpreted the warrant clause of the Fourth Amendment as requiring a search warrant for all criminal searches that do not fall into a set of explicitly delineated exceptions.[14] The Court's concern is that police engaged in the somewhat competitive enterprise of uncovering violations of the law may not exercise the discretion necessary to prevent unconstitutional invasions into the lives of private citizens.[15] The warrant requirement effectively interposes the impartial judgment of a magistrate between police officers and the premises those officers desire to search as part of a criminal investigation.[16]

Despite the Supreme Court's expressed advocacy of the warrant process, however, the Court has created a number of exceptions to the warrant requirement.[17] For instance, the Court has upheld warrantless searches of automobiles[18] and of facilities in pervasively regulated industries[19] based on the notion that there is a lower expectation of privacy associated with those areas.[20] The Court has also created exceptions to the warrant requirement for searches authorized by voluntary consent,[21] searches incident to a lawful arrest,[22] and searches conducted under exigent circumstances.[23] The remainder of this Comment focuses on the exigent circumstances exception to the warrant requirement.

III. The Exigent Circumstances Exception

As early as 1948, the Supreme Court recognized that sometimes there arise "exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant may be dispensed with."[24]

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[14] *See* Warner, *supra* note 3, at 425–26.

[15] *See* Johnson v. United States, 333 U.S. 10, 14–15 (1948).

[16] *See id.*

[17] *See* Annual Review, *supra* note 6, at 877–952.

[18] *See* Carroll v. United States, 267 U.S. 132, 153 (1925).

[19] *See* New York v. Burger, 482 U.S. 691, 699–703 (1987).

[20] *See id.*; *Carroll*, 267 U.S. at 153.

[21] *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

[22] *See* United States v. Robinson, 414 U.S. 218, 235 (1973).

[23] *See* McDonald v. United States, 335 U.S. 451, 456 (1948). The exceptions listed are merely a sample. For detailed treatment of all of the exceptions to the Fourth Amendment warrant requirement, see Annual Review, *supra* note 6, at 877–952.

[24] Johnson v. United States, 333 U.S. 10, 14–15 (1948); Comment, United States v. McDonald: *The Exigent Circumstances Exception and the Erosion of the Fourth Amendment*, 20 Hofstra L. Rev. 407, 407–08 (1991) [hereinafter Comment].

This recognition evolved into the exigent circumstances exception to the warrant requirement.[25]

The exigent circumstances exception vitiates the warrant requirement when two criteria are met: (1) the authorities engaged in a warrantless search had criminal probable cause to search; and (2) exigent circumstances existed which required immediate action and left no time to secure a search warrant.[26]

A. *Probable Cause*

Before applying the exigent circumstances exception, a court must be satisfied that the search at issue was supported by criminal probable cause.[27] In many Supreme Court cases dealing with exigent circumstances, the existence of probable cause appears to be unchallenged, and the Court explicitly deals only with the question of whether a sufficient exigency justified the search.[28] However, in cases where the existence of probable cause to search is questionable, courts spend more time explicitly discussing this first requirement.[29]

To meet the probable cause requirement, authorities engaged in a criminal search must have "reasonable grounds to believe" that their search will yield evidence of a particular crime and that therefore, an invasion of privacy is justified.[30] Essential to the probable cause requirement is individualized suspicion (1) that a crime has been committed; and (2) that evidence of that crime will be discovered through the search.[31]

The Supreme Court has emphasized that probable cause is a flexible concept.[32] Judges and magistrates making the probable cause determination consider factors such as the truthfulness and the basis of knowledge of persons supplying information to criminal investigators,

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[25] *See* Comment, *supra* note 24, at 407–08.

[26] *See* Annual Review, *supra* note 6, at 902.

[27] *See id.*

[28] *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (police who were informed that an armed robber entered a dwelling presumably had probable cause to search the dwelling); United States v. Jeffers, 342 U.S. 48, 48 (1951) (states conclusively that officers had "reason to believe" narcotics were unlawfully concealed in hotel room); McDonald v. United States, 335 U.S. 451, 455 (1948) (sound of adding machine presumably satisfies probable cause requirement).

[29] *See, e.g.*, Johnson v. United States, 333 U.S. 10, 13 (1948) (magistrate might have found probable cause, but no exigency justified the search); Ohio v. Denune, 612 N.E.2d 768, 774–75 (Ohio Ct. App. 1992) (discussing reasons for refusal to find probable cause), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[30] *See* Mussio, *supra* note 9, at 188.

[31] *See id.* at 188 n.16.

[32] *Id.* (citing Illinois v. Gates, 462 U.S. 213, 231 (1983)).

the likelihood of independent corroboration of the information, the level of detail and specificity in the proffered information, and the existence of any statements against the penal interests of the informant.[33] None of these factors is conclusive—a deficiency as to one can be compensated for by a strong showing as to another.[34]

Probable cause may be difficult to establish when authorities initially rely on an anonymous tip.[35] In such cases, the authorities have no proof of the informant's credibility. Further, the information provided may not contain the level of specificity or detail necessary to provide alternative grounds for a finding of trustworthiness.[36]

In a small number of cases applying the exigent circumstances exception, the criminal probable cause requirement is waived completely.[37] These cases involve circumstances in which law enforcement officials enter private premises without a warrant for the purpose of preventing or alleviating some urgent "civil emergency," such as a fire.[38] While doing so, the authorities stumble upon evidence of a crime that is later sought to be introduced at a criminal trial.[39] In such cases, despite the absence of probable cause to search, courts have held that the criminal evidence is admissible under the exigent circumstances exception.[40] Two examples of this type of case, *Wayne v. United States*[41] and *United States v. Echegoyen*,[42] are discussed in more detail below.[43]

B. *Exigent Circumstances*

Where probable cause exists, a court will uphold a warrantless search under the exigent circumstances exception if the state can prove that some exigency made the search imperative, and left no

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[33] *See id.* at 189; *Gates*, 462 U.S. at 231; RONALD J. ALLEN & RICHARD B. KUHNS, CONSTITUTIONAL CRIMINAL PROCEDURE 580–81 (2d ed., Little, Brown and Co. 1991) [hereinafter ALLEN & KUHNS].

[34] *See Gates*, 462 U.S. at 230–31.

[35] Mussio, *supra* note 9, at 189–90; *see, e.g.*, Ohio v. Denune, 612 N.E.2d 768, 774–75 (Ohio Ct. App. 1992) (concluding that search based on anonymous tip was not supported by probable cause), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[36] *See, e.g., Denune*, 612 N.E.2d at 774–75.

[37] *See, e.g.*, United States v. Echegoyen, 799 F.2d 1271, 1278 (9th Cir. 1986); Wayne v. United States, 318 F.2d 205, 211–12 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

[38] *See Wayne*, 318 F.2d at 211–12; Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 508 (1988) (discussing "emergency doctrine").

[39] *See, e.g., Echegoyen*, 799 F.2d at 1280; *Wayne*, 318 F.2d at 211–12.

[40] *See, e.g., Echegoyen*, 799 F.2d at 1280; *Wayne*, 318 F.2d at 211–12.

[41] 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

[42] 799 F.2d 1271 (9th Cir. 1986).

[43] *See infra* Section IV.

time to secure a warrant.[44] "Exigent circumstances" describe those instances in which a search must be conducted "now or never,"[45] such as where a suspect is fleeing the scene moments after the commission of an offense,[46] where the likelihood that evidence will be lost, destroyed, or moved from the jurisdiction is imminent,[47] or where there is a need to protect human life or property or to avoid serious injury.[48]

No uniform test exists for determining the presence or absence of exigent circumstances—courts generally proceed on a case-by-case basis.[49] Some courts emphasize subjective factors, such as whether the authorities who conducted a search "reasonably believed" at the time they acted that an exigency existed that required immediate action.[50] Other decisions do not consider the subjective perceptions of the authorities who conducted the search, but instead engage in an objective totality-of-the-circumstances analysis of whether an exigency existed at the search's inception.[51]

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[44] *See* McDonald v. United States, 335 U.S. 451, 456 (1948) ("We cannot be true to [the constitutional warrant requirement] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made the course imperative.").

[45] *See* Cheryl Johnson, Note, *With Probable Cause to Search But With Exigent Circumstances*, 26 How. L.J. 946, 948 (1983).

[46] *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (upholding warrantless search of a house that fleeing suspect had entered).

[47] *See, e.g.*, *McDonald*, 335 U.S. at 455 (suggesting that no warrant is required if property is in the process of destruction or likely to be destroyed); Carroll v. United States, 267 U.S. 132, 153 (1925) (recognizing mobility as an exigency that justifies a warrantless search). *But see* Commonwealth v. Krisco Corp., 653 N.E.2d 579, 585 (Mass. 1995) (mobility of evidence is not an exigency where long-term surveillance provided notice to authorities that removal would occur on particular date).

[48] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 392 (1967). When the exigent circumstances exception involves imminent danger to life, health, or property, it sometimes is referred to as the "emergency doctrine." *See* Hardin, *supra* note 38, at 508.

[49] Warner, *supra* note 3, at 426 (citing United States v. Morrow, 541 F.2d 1229 (7th Cir. 1976) and United States v. McKinney, 477 F.2d 1184 (D.C. Cir. 1976) (each stating that a court must look to the facts of a particular case to determine whether there was an exigency)).

[50] *See, e.g.*, *Mincey*, 437 U.S. at 392 ("the [F]ourth [A]mendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid"); Cupp v. Murphy, 412 U.S. 291, 292, 296 (1973) (exigent circumstances justified search of fingernails for skin, blood cells, and fabric when police reasonably believed suspect had knowledge of police suspicion creating motive to destroy evidence); Dorman v. United States, 435 F.2d 385, 392–93 (D.C. Cir. 1970) (exigent circumstances justify warrantless search where police reasonably believe suspect is armed and reasonably believe suspect is on premises searched); *see also* Johnson, *supra* note 45, at 948 (stating that, in applying the exigent circumstances exception, courts generally will look to the surrounding circumstances as perceived by the police at the time of the warrantless search).

[51] *See, e.g.*, Ohio v. Denune, 612 N.E.2d 768, 775 (Ohio Ct. App. 1992) (despite evidence that authority conducting search believed exigency existed, court looked at record objectively and denied existence of exigent circumstances), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

The United States Supreme Court has not spoken on the issue whether the proper standard for determining the existence of an exigency is subjective or objective, rather, the Court has considered both types of evidence.[52] Interestingly, those Supreme Court decisions that give weight to the subjective beliefs of the authorities as to whether an exigency was present when they conducted a warrantless search almost invariably result in a conclusion that the search is justified under the exigent circumstances exception.[53]

IV. Judicial Development of the Exigent Circumstances Exception

A. *United States Supreme Court and United States Courts of Appeals Decisions*

One of the earliest cases acknowledging the existence of the exigent circumstances exception to the Fourth Amendment warrant requirement is *McDonald v. United States*.[54] In *McDonald*, petitioners McDonald and Washington challenged the police's warrantless entry into a rooming house in which McDonald had rented a room.[55] The police suspected that McDonald and Washington were operating an illegal lottery and had kept both men under surveillance for nearly two months.[56] On the day of the challenged search, police officers believed that they heard the sound of an adding machine emitting from McDonald's room.[57] Deducing from that sound that an illegal lottery was being conducted inside, the police entered McDonald's room and observed McDonald and Washington operating a lottery.[58] The officers arrested both men and seized machines, papers, and money.[59] These articles were admitted into evidence at the defendants' trial for operation of an illegal lottery, and the defendants were convicted.[60] On appeal, the defendant-petitioners argued that the search which uncovered the evidence leading to their conviction was conducted with-

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[52] *Compare Mincey*, 437 U.S. at 392 *and* Warden v. Hayden, 387 U.S. 294, 299–300 (1966) (considering subjective beliefs of authorities) *with* Vale v. Louisiana, 399 U.S. 30, 34–35 (1969) *and* McDonald v. United States, 335 U.S. 451, 454–55 (1948) (no consideration of subjective beliefs of authorities; focusing on objective idea of "exigency").

[53] *See Mincey*, 437 U.S. at 392; *Hayden*, 387 U.S. at 299–300.

[54] 335 U.S. at 454.

[55] *See id.* at 451.

[56] *See id.* at 452.

[57] *See id.*

[58] *See id.* at 452–53.

[59] *See McDonald*, 335 U.S. at 453.

[60] *See id.* at 451.

out a warrant and was therefore unlawful.[61] The prosecution countered that the petitioners' commission of a crime in the presence of the officers constituted an exigent circumstance which justified the warrantless search.[62]

The Supreme Court rejected the prosecution's argument.[63] While recognizing that the sound of the adding machine arguably provided probable cause to search McDonald's room, the Court held that no exigency existed to justify the warrantless search.[64] The Court stated that the police officers in this case did not respond to any emergency.[65] Further, no other compelling circumstances existed to validate the search—the petitioners were not fleeing or seeking escape nor was the relevant evidence in the process of destruction or likely to be destroyed.[66] In light of the absence of any "exigencies" that would have made the officers' course of action imperative, the Court refused to uphold the warrantless search.[67]

Three years later, the Supreme Court again declined to uphold a warrantless search based on exigent circumstances in *United States v. Jeffers*.[68] In *Jeffers*, the police suspected that the defendant unlawfully had stored narcotics in his aunt's hotel room.[69] With probable cause to search, but without a warrant for search or arrest, police officers entered the hotel room, searched it, and seized the narcotics they discovered.[70] At trial, the defendant argued that the seizure of the narcotics was invalid due to the officers' failure to procure a search warrant.[71] On appeal, the Supreme Court agreed.[72] The Court noted that there was no threat of violence or imminent destruction of the

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[61] *See id.*

[62] *See id.* at 454.

[63] *See id.*

[64] *See McDonald*, 335 U.S. at 455.

[65] *Id.* at 454.

[66] *Id.* at 455; *see also* Johnson v. United States, 333 U.S. 10, 15 (1948) (warrantless search is not valid where no suspect was fleeing, search was of permanent—not movable—premises, and no evidence was threatened with removal or destruction).

[67] *See McDonald*, 335 U.S. at 455–56. The Court declared:

> [w]e are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police. . . . We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made the course imperative.

Id.

[68] Johnson, *supra* note 45, at 950; *see* United States v. Jeffers, 342 U.S. 48, 52 (1951).

[69] *See Jeffers*, 342 U.S. at 48.

[70] *See id.* at 48, 50.

[71] *See id.* at 49.

[72] *See id.* at 52.

evidence.[73] Moreover, since the apartment was empty at the time of the search, the police could have prevented any destruction or removal of the evidence contained therein merely by guarding the door.[74] Thus, the Court held that no exigent circumstances existed to justify the warrantless search.[75]

In both *Jeffers* and *McDonald v. United States*, the Supreme Court declined to find exigent circumstances.[76] However, the Supreme Court and lower courts have upheld warrantless searches based on the existence of exigent circumstances in a range of different contexts.[77] Courts have sanctioned warrantless searches based on exigency where there was a likelihood that evidence would be destroyed or removed from the jurisdiction,[78] where police were in hot pursuit of a suspect and had probable cause to arrest,[79] where authorities reasonably believed a suspect would flee the jurisdiction before a warrant could be obtained,[80] or where those who conducted the search reasonably perceived a threat of imminent danger to human life or property.[81]

Of these examples, the "imminent danger" cases, such as the hypothetical hazardous substance situation posed at the opening of this Comment, are most applicable in the environmental context. *Wayne v. United States*[82] was one of the earliest cases to elaborate on the idea

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[73] *See id.*

[74] *Jeffers*, 342 U.S. at 52; *see also* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (no exigency exists where there is no one present to destroy the evidence).

[75] *Jeffers*, 342 U.S. at 52.

[76] *See id.*; McDonald v. United States, 335 U.S. 451, 455–56 (1948).

[77] *See* Annual Review, *supra* note 6, at 902–04.

[78] *See, e.g.*, United States v. Santana, 427 U.S. 38, 43 (1976) (warrantless search justified where any delay would result in destruction of narcotics evidence). Of the destruction or removal-of-evidence cases, the most prevalent involve narcotics charges. *See* Annual Review, *supra* note 6, at 902–03. Due to the ease with which narcotics can be destroyed, criminal investigations involving narcotics often result in a warrantless search or seizure which later is upheld under the exigent circumstances exception. *See id.* If long-term surveillance has provided authorities with reasonable notice that evidence will be removed on a certain day, however, the exigent circumstances exception will not vitiate the warrant requirement. *See* Commonwealth v. Krisco Corp., 653 N.E.2d 579, 585 (Mass. 1995) (where surveillance revealed pattern of illegal waste disposal, failure to obtain warrant between dumping of waste and removal of materials dumped on a particular day was not excused by exigent circumstances).

[79] *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1966) (warrantless search valid where police in hot pursuit and had probable cause to arrest armed robbery suspect).

[80] *Compare* United States v. Lai, 944 F.2d 1434, 1443 (9th Cir.) (warrantless entry justified where defendant's possession of police scanner and potential knowledge of accomplice's arrest created risk that defendant would flee), *cert. denied*, 502 U.S. 1062 (1991) *with McDonald*, 335 U.S. at 454 (no exigent circumstances where suspects were busily engaged in lottery venture and thus not likely to flee).

[81] *See* Annual Review, *supra* note 6, at 902.

[82] 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

that imminent danger to human life or property could constitute an exigency that vitiates the warrant requirement.[83] In *Wayne*, police officers on routine patrol were instructed to check on a report of an "unconscious woman."[84] Upon the officers' arrival at the house in which the woman allegedly lay, the police knocked several times, identified themselves as police officers, and requested entry.[85] The officers, however, received no response.[86] After unsuccessfully attempting to obtain master keys to the residence, the police officers broke down the door and entered.[87] Inside, they found the body of a deceased girl and other evidence that eventually led to the conviction of Lewis L. Wayne for an attempted abortion terminating in death.[88] On appeal, Wayne argued that the evidence gathered against him was the fruit of an illegal warrantless search.[89]

The United States Court of Appeals for the District of Columbia Circuit held that the exigent circumstances exception to the Fourth Amendment warrant requirement justified the police officers' search.[90] According to the court, warrants are not required to break into a burning home to rescue occupants or extinguish a fire, to prevent a shooting, or to bring emergency aid to an injured person.[91] The need to protect or preserve life and to avoid serious injury is justification for what otherwise would be illegal absent an exigency or emergency.[92]

The *Wayne* court recognized that a balancing of interests is involved in determining whether an exigency can validate a warrantless search. The court stated:

> [t]he appraisal of exigent circumstances . . . presents difficult and delicate problems. These cases do not arise in the calm that pervades a courtroom or library. They are rarely if ever seen by courts except in cases where criminal activity has been uncovered by the challenged police actions. . . . The business of policemen and firemen is to *act*, not to speculate or meditate on whether the report is correct. People could well die in emergencies if police

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[83] *See id.* at 211–13.

[84] *See id.* at 212–13.

[85] *See id.* at 207.

[86] *See id.*

[87] *See Wayne*, 318 F.2d at 207.

[88] *See id.*

[89] *See id.* at 208.

[90] *See id.* at 213–14.

[91] *Id.* at 212; *see, e.g.*, Michigan v. Clifford, 464 U.S. 287, 293 (1984) (plurality opinion) (warrantless entry justified when building was aflame); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (warrantless entry of burning building is valid).

[92] *Wayne*, 318 F.2d at 212.

> tried to act with the calm deliberation associated with the judicial process. . . . Evidence of a fire or of escaping gas would warrant public authority to enter by any available means. . . . That such an entry would be an intrusion is undoubted but here we reach the balancing of interests and needs.[93]

On the facts of *Wayne*, the court noted, the police were instructed to check on a report of an "unconscious woman" and could not assume the woman was dead.[94] Swift response was essential.[95] Had the police paused for a warrant and risked the possibility that the woman might die while papers were drawn, their actions surely would have merited censure.[96] The interest in protecting life and property superseded individual interests in privacy in this case.[97] Thus, the court concluded, the officers' warrantless entry was justified.[98]

Addressing the question of probable cause almost as an afterthought, the *Wayne* court stated that while the police may have had reasonable grounds to believe a crime had been committed in the apartment, the record was unclear.[99] The court concluded, however, that a "civil emergency" justified the entry, and that the evidence of a crime that the police had observed incidentally while responding to such emergency need not be suppressed.[100] The *Wayne* case thus represents a departure from the usual rule that criminal searches conducted under exigent circumstances are valid only when supported by probable cause.[101]

The United States Supreme Court discussed imminent danger to humans as an exigent circumstance in *Warden v. Hayden*.[102] In *Hayden*, police officers had probable cause to search a private home for a robbery suspect.[103] Moreover, the police had reason to believe the suspect was armed.[104] Several police officers entered and searched the home without a warrant.[105] One officer discovered the suspect in an upstairs bedroom.[106] Meanwhile, other officers searched a toilet tank

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[93] *Id.* at 211–12.
[94] *Id.* at 212–13.
[95] *See id.* at 213.
[96] *Id.*
[97] *See Wayne*, 318 F.2d at 214.
[98] *See id.* at 212–14.
[99] *See id.* at 212.
[100] *See id.* at 212–14.
[101] *See supra* Section III.A.
[102] 387 U.S. 294 (1967).
[103] *See id.* at 297–98.
[104] *See id.* at 298.
[105] *See id.*
[106] *See id.*

and found two guns.[107] Another officer searched the washing machine in the cellar and discovered articles of clothing that matched the description of those worn by the man who fled the scene of the crime.[108] These items and others were seized and introduced against the defendant at his trial for armed robbery.[109]

The Supreme Court held that the exigencies of the situation in *Hayden* justified the warrantless search and that the evidence seized was admissible.[110] According to the Court, "the Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[111] When police reasonably believe that the safety of law enforcement officials or the general public is threatened, they may enter a premises and search for a suspect before a warrant is obtained.[112] In *Hayden*, the Court stated that the police acted reasonably when they entered the house and searched for a man fitting the description they had been given and for weapons he had used in the robbery and might use against them.[113]

In addition to searches for *people*, such as victims[114] and suspects,[115] an imminent danger exigency can justify searches of places where law enforcement authorities reasonably believe inherently dangerous *items* are present.[116] Weapons, such as handguns, qualify as inherently dangerous items.[117] Similarly, the suspected presence of a bomb may justify a warrantless search.[118]

Other imminent dangers also may constitute exigent circumstances. For instance, even where a fire has not yet begun, an imminent fire

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[107] *See Hayden*, 387 U.S. at 298.

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *See id.* at 298–99.

[112] *See Hayden*, 387 U.S. at 298–99; Annual Review, *supra* note 6, at 904.

[113] *See Hayden*, 387 U.S. at 298.

[114] *See* Wayne v. United States, 318 F.2d 205, 212–14 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

[115] *See Hayden*, 387 U.S. at 298–99.

[116] *See* Annual Review, *supra* note 6, at 904–05.

[117] *See, e.g.*, Cady v. Dombrowski, 413 U.S. 433, 448 (1973) (warrantless search for gun in trunk of impounded car valid when arresting officers reasonably believed suspect carried weapon); United States v. Antwine, 873 F.2d 1144, 1147 (8th Cir. 1989) (warrantless search valid when police knew handgun was in house where children would be left alone after defendant was arrested).

[118] *See, e.g.*, United States v. Sarkissian, 841 F.2d 959, 962 (9th Cir. 1988) (warrantless search of luggage valid when police knew bomb was in luggage on commercial flight).

hazard can create an exigency sufficient to justify the warrantless entry of a building to eliminate the hazard.[119] In *United States v. Echegoyen*, for example, the warrantless entry of police deputies into a home from which the smell of ether emitted was upheld under the exigent circumstances exception.[120] The United States Court of Appeals for the Ninth Circuit held that the officers' concern over a potential fire hazard justified the warrantless search, despite the fact that the officers also suspected—and later discovered—that illicit drug activity was taking place within the home.[121] The court noted with approval that "the officers acted out of concern for the safety of the area," and the court further emphasized that the officers had limited their search to securing suspects and reducing the fire danger.[122] The court was not persuaded by the defendant's argument that the claimed exigent circumstances were a pretext, and the real purpose of the search was to "bust" the suspected narcotics activity.[123] The officers' behavior upon entering the dwelling clearly was aimed at reducing the hazards of fire and explosion.[124] Thus, the search was justified under the exigent circumstances exception to the Fourth Amendment warrant requirement.[125]

As has been illustrated, courts have upheld warrantless searches based on exigency in various factual contexts.[126] Where the primary purpose for a search is to further a criminal investigation, courts require a showing of both criminal probable cause and sufficient exigency before evidence will be admitted under the exigent circumstances exception.[127] Where authorities respond to a civil emergency, however, and the primary purpose for conducting a search is to protect life or property, the probable cause requirement does not prevent

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[119] Annual Review, *supra* note 6, at 906–07. *Compare* United States v. Echegoyen, 799 F.2d 1271, 1278–79 (9th Cir. 1986) (warrantless entry justified when serious fire hazard required immediate action) *with* United States v. Warner, 843 F.2d 401, 404 (9th Cir. 1988) (warrantless entry not valid despite presence of inherently volatile chemicals on premises because officer knew that suspect was not at home and that chemicals had been stored there without incident for at least two weeks).

[120] *See Echegoyen*, 799 F.2d at 1274, 1278–79.

[121] *See id.* at 1278.

[122] *See id.*

[123] *See id.* at 1279.

[124] *See id.* at 1278–79.

[125] *See Echegoyen*, 799 F.2d at 1278–79.

[126] *See* Annual Review, *supra* note 6, at 902–04.

[127] *See id.* at 902.

the admission of evidence that authorities discover incidentally during the course of their search.[128]

B. Mullins[129] *and* Denune:[130] *Application of the Exigent Circumstances Exception Where the Exigency Is Imminent Harm to the Environment*

Situations that pose an imminent threat of harm to humans or to property commonly qualify as exigencies sufficient to vitiate the Fourth Amendment warrant requirement.[131] But what about circumstances that pose an imminent threat of harm to the *environment*? At least two state courts have discussed the possibility that a warrantless search of private premises could be upheld under the exigent circumstances exception if imminent harm to the environment was threatened at the time of the search.[132]

In *Matter of Mullins & Pritchard, Inc.*, decided by the Louisiana Court of Appeal in 1989, an owner of oilfield production facilities sought review of a Department of Environmental Quality (DEQ) order that assessed penalties for impermissible discharges discovered during several warrantless inspections of the owner's premises.[133] On appeal, the owner argued that the statutory scheme that authorized the warrantless inspection of his premises violated the United States Constitution because the scheme did not honor the Fourth Amendment warrant requirement.[134]

The statute in question authorized warrantless inspections of all facilities subject to certain environmental regulations.[135] The statute

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[128] *See Echegoyen*, 799 F.2d at 1278–79; Wayne v. United States, 318 F.2d 205, 211–12 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963).

[129] Matter of Mullins & Pritchard, Inc., 549 So.2d 872 (La. Ct. App. 1989).

[130] Ohio v. Denune, 612 N.E.2d 768 (Ohio Ct. App. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[131] *See* Annual Review, *supra* note 6, at 902–04.

[132] *See Denune*, 612 N.E.2d at 775; *Mullins*, 549 So.2d at 877.

[133] *See Mullins*, 549 So.2d at 872. After receiving complaints from the Office of Conservation and at least one private citizen, the DEQ had made several visits to the owner's property and observed persisting evidence of oil discharges and spillages. *See id.* at 873. For instance, during one inspection, a DEQ official found that a valve on a glycol unit had been left open, from which discharge was seeping, oilfield waste was seeping from a burn pit and discharge was escaping from a reserve pit, one reserve pit had an orange color attributable to the presence of emulsified oil, and a pit levee was broken, causing oil to escape into an adjacent swamp. *See id.* at 873–74.

[134] *See id.* at 875.

[135] *See id.* (citing LA. REV. STAT. ANN. § 30:2012 (West 1989)).

also codified effectively the exigent circumstances exception to the warrant requirement by providing for unannounced "special inspections" based on the presence of exigent circumstances.[136] The statute defined "exigent circumstances" as "imminent danger to the environment or health."[137]

The Louisiana Court of Appeal upheld the statute.[138] First, the court noted that the appellant-owner's facilities were part of a "pervasively regulated industry," and thus the owner's expectation of privacy was limited.[139] Second, the statute's codification of the exigent circumstances exception, including the definition of exigency as a threat of imminent harm to the environment, was justified by Louisiana's substantial interest in improving the health and welfare of its citizens through environmental-control regulations.[140] The court stated that an industrial owner "cannot help but know that its facilities will be subject not only to periodic inspections, but also to special inspections whenever an exigency exists."[141]

In discussing the "exigency" provision, the court was impressed by the fact that the statute required a "reasonable belief" that exigent conditions exist, and limited the scope of warrantless inspections to those matters reasonably related to the exigent condition.[142] The *Mullins* court's validation of the Louisiana statute suggests that, at least within pervasively regulated industries, the threat of imminent environmental harm qualifies as an exigency that can justify an unannounced warrantless search.[143]

In a more recent case, *Ohio v. Denune*, the State of Ohio unsuccessfully attempted to defend a warrantless search of private premises

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[136] *See id.* at 875–76.

[137] Louisiana's statute provided, in pertinent part, that "[w]henever there exists an imminent danger to the environment or health . . . the secretary [of the DEQ] may cause a special inspection to be made of the facility where such exigent conditions are reasonably believed to exist." *See id.* at 876–77 (citing LA. REV. STAT. ANN. § 30:2012). The statute further provided that any warrantless inspection made pursuant to the terms aforementioned would not preclude the prosecution of any violations discovered in the course of the investigation. *See id.*

[138] *See Mullins*, 549 So.2d at 877.

[139] *See id.* at 875–76 (citing New York v. Burger, 482 U.S. 691, 699–703 (1987)). The court's rationale commonly is associated with the "pervasively regulated industry exception" to the Fourth Amendment warrant requirement formally recognized in *Burger*. *See Burger*, 482 U.S. at 699–703 (no warrant required if premises are part of pervasively regulated industry). A detailed analysis of this exception is beyond the scope of this Comment.

[140] *See Mullins*, 549 So.2d at 877.

[141] *See id.*

[142] *See id.*

[143] *See id.*

where environmental harm seemed imminent at the time of the search.[144] The *Denune* case involves circumstances almost identical to those in the hypothetical posed at the beginning of this Comment.[145] The Ohio Environmental Protection Agency (OEPA) received an anonymous tip that a trailer full of carcinogenic polychlorinated biphenyls (PCBs)[146] would be removed from the Dixie Distributing, Inc. warehouse before a scheduled OEPA inspection of the warehouse premises the following day.[147] The OEPA immediately arranged with a local fire department for joint surveillance of the warehouse.[148] When two OEPA investigators arrived to begin their surveillance shift, the fire department officials already present stated that they had observed fifty-five gallon drums or transformers being loaded into the back of the suspect trailer.[149]

One of the OEPA investigators, William Palmer, followed the suspect tractor-trailer when it left the warehouse.[150] The tractor-trailer proceeded along a major highway for several miles before turning onto a bumpy dirt road.[151] The dirt road led to a salvage yard where six other Dixie Distributing, Inc. trailers were parked.[152]

After the driver detached the trailer containing the drums and departed in the tractor, Inspector Palmer conducted a visual inspec-

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[144] *See* Ohio v. Denune, 612 N.E.2d 768, 775 (Ohio Ct. App. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[145] *See supra* notes 1–3 and accompanying text.

[146] PCBs are the focus of extensive regulation under the Toxic Substances Control Act (ToSCA), 15 U.S.C. §§ 2610–29 (1982). *See* Judson W. Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379, 388 (1986). PCBs have been found to cause chloracne, skin and eye irritations, nausea, edema of the face and hands, liver disorders, as well as digestive disorders and abdominal pain in persons chronically exposed to the chemical. *Id.* at 388 n.34. There is substantial experimental epidemiological evidence that PCBs pose a carcinogenic risk to humans. *Id.* Furthermore, PCBs are very persistent in the environment—they resist destruction by agents in nature. *Id.* PCBs accumulate in the tissues of humans, animals (especially fish), birds, and plants. *Id.* According to the EPA, PCBs, unless properly disposed of, will persist and work their ill effects upon mankind in the natural environment for generations to come. *Id.* (citing UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUPPORT DOCUMENT VOLUNTARY ENVIRONMENTAL IMPACT STATEMENT: PCB MANUFACTURING, PROCESSING, DISTRIBUTION IN COMMERCE AND USE BAN REGULATION: ECONOMIC IMPACT ANALYSIS 2 (Apr. 1979)).

[147] *See Denune*, 612 N.E.2d at 770.

[148] *See* State's Petition for Writ of Certiorari to the Court of Appeals, Butler County, Ohio at 3, Ohio v. Denune, 612 N.E.2d 768 (Ohio Ct. App. 1992) (No. 92–2281), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[149] *See id.*

[150] *See id.*

[151] *See id.*

[152] *See id.*

tion of the yard then contacted the caretaker to obtain consent to search the newly arrived trailer.[153] Having obtained such consent, Inspector Palmer cut the padlock off the trailer and searched its interior.[154] Inside the trailer, Inspector Palmer found ten transformers containing PCBs and an unlabelled fifty-five gallon drum.[155] The lids from the transformers had been removed, and oil was leaking from the seals.[156]

Determining that the leaks inside the trailer did not require any immediate action, Palmer departed and obtained a warrant to search the other six trailers in the yard.[157] Based on evidence gathered in these subsequent searches, Harry Denune, owner of Dixie Distributing, Inc., was convicted for illegal transportation, disposal, and storage of hazardous waste, failure to evaluate waste, failure to conduct analysis of waste, failure to prepare a uniform waste manifest, criminal endangering, and illegal operation of a waste facility.[158]

On appeal, Denune argued that the initial search conducted by Inspector Palmer violated the United States Constitution due to Inspector Palmer's failure to secure a search warrant.[159] Consequently, Denune argued, all the evidence garnered as a result of that search should have been suppressed at trial.[160] Ohio countered Denune's argument by raising three exceptions to the Fourth Amendment warrant requirement which could have justified Inspector Palmer's search: the consent exception, the automobile exception, and the exigent circumstances exception.[161]

Before deciding whether any of the above-mentioned exceptions applied, the Ohio Court of Appeals addressed the issue of probable cause.[162] The court pointed out that the only information Inspector Palmer possessed concerning the trailer had been conveyed by an anonymous caller whose reputation for truthfulness was not known.[163] The information the caller provided, moreover, was not sufficiently specific to give rise to a valid suspicion of criminal activity.[164] Viewing

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[153] *See Denune*, 612 N.E.2d at 770.
[154] *See id.*
[155] *See id.*
[156] *See id.* at 770–71.
[157] *See id.* at 771.
[158] *See Denune*, 612 N.E.2d at 770.
[159] *See id.* at 768.
[160] *See id.* at 769.
[161] *See id.* at 774–77.
[162] *See id.* at 774–75.
[163] *See Denune*, 612 N.E.2d at 774–75; *see also supra* Section III.A.
[164] *See Denune*, 612 N.E.2d at 774–75.

the totality of the circumstances, the court held that Ohio had failed to prove that Inspector Palmer had probable cause to search the Dixie Distributing, Inc. trailer.[165]

Despite the court's conclusion that the probable cause requirement had not been met, the court proceeded to examine the applicability of each of the exceptions to the Fourth Amendment warrant requirement that had been raised by the state.[166] In doing so, the court found each exception inapplicable.[167]

First, the court held that the caretaker did not have authority to consent to the search on behalf of Denune.[168] Thus, the court concluded that the consent exception did not apply.[169] Second, the court found that the traditional justification for the automobile exception—mobility of evidence—was not present because the suspect trailer was detached from the tractor at the time of the search.[170] The automobile exception, therefore, was also inapplicable.[171] Finally, the court considered whether any "other" exigencies might have validated Inspector Palmer's search.[172] The court noted that the state had raised a concern regarding the potential hazard posed to the environment by the threat of leakage from the drums within the trailer.[173] The court stated, however, that the situation encountered by Inspector Palmer did not present an exigent circumstance because there was no indication that harm to the environment was "imminent."[174] The court recognized that the trailer was situated in a "vulnerable environmental area," and that the exterior of the trailer "was in poor condition," but stated conclusively that "there was no indication that immediate action was necessary to prevent harm to the environment."[175] Without further explanation, the court held that the exigent circumstances exception did not justify Inspector Palmer's search.[176]

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[165] *See id.* at 775.

[166] *See id.* at 774–77.

[167] *See id.*

[168] *See id.* at 776.

[169] *See Denune*, 612 N.E.2d at 776.

[170] *See id.* at 775.

[171] *See id.* at 776.

[172] *See id.* at 775.

[173] *See id.*

[174] *See Denune*, 612 N.E.2d at 775.

[175] *See id.* Based on Ohio's inability to persuade the Ohio Court of Appeals that Inspector Palmer's search was supported by probable cause and was justified by an exception to the Fourth Amendment warrant requirement, the court held that the evidence presented at trial should have been suppressed, and Denune's convictions were overturned. *See id.* at 777.

[176] *See id.* at 775.

Thus, state courts have been willing to address contentions that imminent harm to the environment qualifies as an exigency that may vitiate the warrant requirement imposed by the Fourth Amendment of the United States Constitution.[177] Despite this willingness, however, no court yet has upheld explicitly under the exigent circumstances exception a warrantless search aimed at preventing imminent harm to the environment.[178]

V. Preventing Imminent Harm to the Environment as a National Priority

In light of current governmental attitudes toward preventing environmental degradation, an expansion of the exigent circumstances exception towards that end may be inevitable. The public, courts, and legislatures have all recognized that the integrity of our environment is a matter of public interest.[179] Commentators assert that environmental harm has replaced nuclear confrontation as *the* vital public issue.[180] Ingrained in this heightened environmental awareness is the perception that our government should act to prevent environmental harm *before* such harm occurs, rather than passively waiting for catastrophic environmental disaster.[181]

Congress has taken a proactive approach to eliminating environmental harm.[182] For example, Congress enacted a "cradle to grave" tracking statute called the Resource Conservation and Recovery Act (RCRA).[183] RCRA attempts to monitor the handling and treatment of hazardous wastes from the moment such wastes are created, with the

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[177] *See, e.g., id.* at 775–76; Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 875 (La. Ct. App. 1989).

[178] *See supra* notes 132–76 and accompanying text.

[179] Susan Verdicchio, Comment, *Environmental Restoration Orders*, 12 B.C. Envtl. Aff. L. Rev. 171, 171 (1985).

[180] Donald Zillman & Peggy Gentles, *NEPA's Evolution, The Decline of Substantive Review*, 20 Envtl. L. 505, 530–31 (1990).

[181] *See* Tracey Cordes, Comment, *Who Gets the Bill?: Determining Insurer's Duty to Defend Against Hazardous Waste Clean-up Costs Under General Liability Policies*, 18 Envtl. L. 931, 947–48 (1988) (discussing insufficiency of harm-react responses to environmental harm).

[182] *See* David A. Rich, Comment, *Personal Liability for Hazardous Waste Cleanup: An Examination of CERCLA Section 107*, 13 B.C. Envtl. Aff. L. Rev. 643, 646–48 (1986) (discussing forward-looking statutes enacted by Congress).

[183] 42 U.S.C. §§ 6901–87 (Supp. II 1984). RCRA focuses on the responsible management of hazardous waste from the time of its creation to the time of its disposal. *See id*; Rich, *supra* note 182, at 646–48 (discussing focus of RCRA).

aim of encouraging caution and thus preventing environmental disasters before they occur.[184]

Congress, moreover, has included "imminent danger" provisions in a number of federal environmental protection statutes, which purport to prevent harm that is threatened, but has not yet actually occurred.[185] Section 7003 of RCRA, for example, authorizes the Environmental Protection Agency (EPA) to seek a judicial order to restrain toxic leaks from hazardous waste sites.[186] Section 7003 was amended in 1980 to extend its application to any hazardous waste site which *may present*—as opposed to *is presenting*—an imminent hazard.[187]

The effectiveness of any legislative "imminent danger" provision, however, hinges upon judicial interpretation.[188] Case law suggests that evidence of potential, rather than actual, harm is enough to establish "danger," and that "imminent" refers to the seriousness of the danger that is threatened.[189] Even showing a risk of serious danger, however, as opposed to actual harm, poses formidable evidentiary problems.[190]

For instance, courts generally expect evidence of the specific effects that environmental pollution will have on humans, whether such effects are economic or health-related.[191] Complaints alleging environmental harm without presenting corresponding proof of how that harm will affect human lives seem, on the whole, to be less persuasive

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[184] *See* Rich, *supra* note 182, at 646–48 (discussing intent of RCRA).

[185] *See id.* at 647 n.42 (citing section 7003 of RCRA, 42 U.S.C. § 6973 (Supp. II 1984); section 1431 of the Safe Drinking Water Act, 42 U.S.C. § 300(a) (1976); section 504(a) of the Clean Water Act (CWA), 33 U.S.C. § 1364(a) (Supp. IV 1980); section 303 of the Clean Air Act (CAA), 42 U.S.C. § 7603 (Supp. IV 1980); and section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9606(a) (1982)).

[186] *Id.* at 647 (discussing RCRA's imminent harm provision).

[187] *Id.* at 648 (citing Pub. L. 98–482 § 25 (1980)). States have enacted similar provisions. *See, e.g.*, Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 875–77 (La. Ct. App. 1989) (discussing LA. REV. STAT. ANN. § 30:2012, which contains an imminent harm provision).

[188] Raymond Rea, Comment, *Hazardous Waste Pollution: The Need for a Different Statutory Approach*, 12 ENVTL. L. 443, 452–53 (1982).

[189] *See* Ethyl Corp. v. EPA, 541 F.2d 1, 13–14 (D.C. Cir.) (en banc) (interpreting Clean Air Act (CAA)), *cert. denied*, 426 U.S. 941 (1976); Reserve Mining Co. v. EPA, 514 F.2d 492, 528 (8th Cir. 1975) (en banc) (interpreting Federal Water Pollution Control Act (FWPCA)); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 596–97 (D.C. Cir. 1971) (interpreting Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)).

[190] *See* Rea, *supra* note 188, at 452–53 (discussing general difficulties in establishing "imminent" harm under RCRA).

[191] *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 12–15 (1992) [hereinafter PLATER] (acknowledging the prevalence of human-centered notions of what constitutes environmental harm).

to courts than those that make that crucial link.[192] Proving degradation of the environment as the definitive source of human health problems, however, is no easy task.[193] Gathering proof is expensive and time-consuming,[194] and even meticulously collected data detailing potential harm to the environment later may be considered unpersuasive in court.[195] Thus, while Congress and state legislatures have mobilized in a proactive effort to prevent environmental harm, strict adherence to rules of evidence has at times prevented courts from following suit.[196]

VI. Analysis: Can Imminent Harm to the Environment Qualify as an Exigent Circumstance That Vitiates the Fourth Amendment Warrant Requirement?

The exigent circumstances exception traditionally has encompassed situations involving imminent danger to humans and/or to property,[197] but courts have never explicitly extended the exception to include circumstances involving imminent harm to the environment. The relatively recent focus of Congress and state legislatures on preventing and criminalizing behaviors that pose the threat of imminent danger to the environment, however, suggests that an expansion of the exigent circumstances exception purported towards achieving the same end is inevitable.[198] Both *Matter of Mullins & Pritchard, Inc.* and *Ohio v. Denune*, moreover, exhibit judicial willingness to entertain arguments advocating an expansion of the exigent circumstances exception to include situations where imminent harm to the environment is threatened.[199]

Under the right circumstances, an imminent threat to the environment should qualify as an exigency that vitiates the Fourth Amend-

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[192] *See id.* at 28 (recognizing vital role of economic concerns in industrialized democracy such as United States); Cordes, *supra* note 181, at 947 (citing Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1354 (4th Cir. 1987)); Rea, *supra* note 188, at 452–53.

[193] *See* Plater, *supra* note 191, at 203–04; Cordes, *supra* note 181, at 947; Rea, *supra* note 188, at 452–53.

[194] *See* Plater, *supra* note 191, at 203.

[195] *See* Cordes, *supra* note 181, at 947; Rea, *supra* note 188, at 452–53.

[196] *See* Cordes, *supra* note 181, at 947; Rea, *supra* note 188, at 452–53.

[197] *See* Annual Review, *supra* note 6, at 902.

[198] *See* Starr, *supra* note 146, at 385–94 (discussing judicial interpretation of congressional mandates).

[199] *See* Ohio v. Denune, 612 N.E.2d 768, 774 (Ohio Ct. App. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993); Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 876–77 (La. Ct. App. 1989); *see also supra* Section IV.B.

ment warrant requirement. The preliminary inquiry in any case always will be whether there was requisite probable cause to search.[200] Beyond the probable cause consideration, several factors will affect a court's decision as to whether a threat of imminent harm to the environment is an exigent circumstance sufficient to justify a warrantless search. Among these factors are how courts choose to interpret "imminent," the degree of emphasis courts place on the existence of statutory authority to search, and judicial willingness to protect the environment at the potential expense of individual privacy interests.

A. *Judicial Interpretation of "Imminent"*

How a court interprets "imminent" will greatly affect the determination whether threatened harm to the environment justifies a warrantless search in a given case.[201] The evidentiary burden of proving "imminent" danger may be easy to overcome in cases where there is unquestionable evidence of potential far-reaching human and environmental harm.[202] Where an environmental threat occurs in a sparsely populated area and the potential harm is less dramatic, however, the required showing of imminent risk can be impossible to satisfy.[203] This is particularly true in cases where courts ignore the perceptions of those who initiated a search and impose their own views of whether harm was imminent at the time of the search.[204]

In *Denune*, for instance, the Ohio Court of Appeals seemed receptive to the argument that imminent harm to the environment might, under the right circumstances, constitute an exigency that vitiates the Fourth Amendment warrant requirement.[205] Despite Inspector Palmer's assertions that he feared a chemical release, however, the

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[200] *See, e.g., Denune*, 612 N.E.2d at 774. For discussion of the probable cause requirement generally, see *supra* Section III.A.

[201] *See, e.g., Denune*, 612 N.E.2d at 775 (narrow interpretation of "imminent" that did not take into account perceptions of authorities engaged in the search resulted in court's conclusion that no exigency existed).

[202] *See* Rea, *supra* note 188, at 453.

[203] *Id.*; *see, e.g.*, Cordes, *supra* note 181, at 947 (citing Maryland Casualty Co. v. Armco, 822 F.2d 1348, 1354 (4th Cir. 1987)). In *Maryland Casualty*, the United States Court of Appeals for the Fourth Circuit refused to order indemnification where the state of Missouri acted proactively, initiating cleanup of a contaminated groundwater supply before harm to humans or animals could be directly attributable to the toxic contamination. *See Maryland Casualty Co.*, 822 F.2d at 1354.

[204] *See, e.g., Denune*, 612 N.E.2d at 775.

[205] *See id.*

court refused to acknowledge that the harm threatened in that case was imminent enough to constitute exigent circumstances.[206]

The question is, to whom must the harm seem imminent—to the court in hindsight, or to the investigators faced with the decision whether to engage in a search? Traditional explications of the exigent circumstances rule are ambiguous on this issue.[207] While some courts find the reasonable subjective beliefs of the investigators compelling,[208] the *Denune* court paid very little attention to Inspector Palmer's contention that he honestly feared a toxic release.[209] Instead, the *Denune* court, in hindsight and without explanation, asserted that there was no indication that immediate action was necessary to prevent harm to the environment.[210] In making this assertion, the court imposed its own assessment of the situation, and virtually ignored the investigator's impression at the time he made the decision to search the trailer.[211] If the court had examined the investigator's assessment of the situation, rather than applying its own assessment, the court more likely would have found exigent circumstances in the *Denune* case.[212]

The court in *Denune* not only imposed its own interpretation of "imminent" irrespective of the investigator's perceptions, but also interpreted "imminent" extremely narrowly.[213] The court noted the fragile ecological character of the area where the trailer was parked, and acknowledged the dilapidated condition of the trailer's exterior.[214] Further, the court knew the trailer contained drums of highly toxic chemicals which had been transported hastily and well could have been leaking.[215] The court, moreover, must have been aware of the difficulty of remediating chemical spills in general.[216] Yet, despite all of these findings, the court held that harm to the environment was

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[206] *See id.*

[207] *See supra* notes 49–53 and accompanying text.

[208] *See, e.g.*, Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("the [F]ourth [A]mendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid"); Dorman v. United States, 435 F.2d 385, 392–93 (D.C. Cir. 1970) (exigent circumstances justify warrantless search where police reasonably believe suspect is armed and reasonably believe suspect is on premises searched).

[209] *See Denune*, 612 N.E.2d at 775.

[210] *See id.*

[211] *See id.*

[212] *See id.* (holding no exigent circumstances were present).

[213] *See id.*

[214] *See Denune*, 612 N.E.2d at 775.

[215] *See id.*

[216] *See* PLATER, *supra* note 191, at 147–48 (discussing the exorbitant expense associated with cleaning up toxic spills).

not "imminent."[217] Thus, the court avoided finding a substantial threat to the environment that could have justified Inspector Palmer's warrantless search of the Dixie Distributing, Inc. trailer.[218]

What, if anything, would have prompted the court to acknowledge an imminent threat to the environment? Would the outcome have been different if Inspector Palmer had actually observed carcinogenic chemicals seeping into the ground before he decided to investigate further? Where a court draws the line for determining what constitutes a substantial enough threat to justify immediate action will certainly affect its determination as to the existence of exigent circumstances.[219]

Why did the *Denune* court draw the line where it did? Perhaps the court genuinely believed that the harm presented by the potential spilling of PCBs into a fragile ecosystem was not imminent enough to justify Inspector Palmer's entry. Or perhaps the *Denune* court, having already determined that Inspector Palmer lacked requisite probable cause to search,[220] had predetermined its "exigency" inquiry. Whatever the reason, the court's extremely narrow definition of "imminent," and the court's decision to ignore Inspector Palmer's perceptions as he embarked on his search, foreclosed application of the exigent circumstances exception in the *Denune* case.[221]

The court in *Denune* did not, however, assert that imminent danger to the environment could *never* justify a warrantless search.[222] The court merely held that the environmental harm threatened in that case was not imminent enough to compel application of the exigent circumstances exception.[223] Conceivably, then, a more urgent threat to the environment could constitute an exigency which vitiates the warrant requirement.

B. *Statutory Authority to Conduct Warrantless Searches*

One obvious difference between *Denune* and *Matter of Mullins & Pritchard, Inc.* is that in *Mullins*, the challenged warrantless searches were conducted pursuant to statutory authority.[224] The statutory scheme

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[217] *See Denune*, 612 N.E.2d at 775.

[218] *See id.*

[219] *See, e.g., id.*

[220] *See id.* at 774.

[221] *See id.*

[222] *See Denune*, 612 N.E.2d at 774–75.

[223] *See id.* at 775.

[224] *See id.* at 770–71; Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 876–77 (La. Ct. App. 1989); *supra* Section IV.B.

upheld in *Mullins* granted officers of the DEQ the authority to conduct warrantless inspections where exigent circumstances exist.[225] "Exigent circumstances" was defined to include those situations which pose an imminent threat of harm to the environment.[226] Once the Louisiana Court of Appeal found the statutory scheme constitutional, the court upheld several warrantless inspections made pursuant to the statute's exigency clause.[227] The outcome of *Mullins* demonstrates judicial willingness to uphold warrantless searches on grounds of imminent danger to the environment, at least where the premises inspected were part of a facility in a highly regulated industry, and where statutory authority to search existed.[228]

In *Ohio v. Denune*, however, there was no reference to a statute authorizing the warrantless inspection of the Dixie Distributing, Inc. trailer.[229] Although the handling of PCBs is certainly a highly regulated industry, the investigator in *Denune* did not point to a statutory justification for his search.[230] Perhaps this lack of statutory authority contributed to the court's unwillingness to uphold Inspector Palmer's search. A statutory mandate might make courts more willing to uphold warrantless searches based on an environmental exigency. Courts, however, traditionally have not required statutory authorization as a prerequisite for upholding warrantless searches.[231] Every exception to the Fourth Amendment warrant requirement was created by the judicial branch.[232] There is simply no precedent for a court's insisting that legislatures take the lead in fashioning exceptions to the Fourth Amendment warrant requirement.[233]

C. *Judicial Willingness to Protect the Environment at the Potential Expense of Individual Privacy Interests*

Whether imminent harm to the environment ever will be recognized as an exigency that justifies a warrantless search, will depend, to a large extent, on judicial willingness to make protection of the

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[225] *See Mullins*, 549 So.2d at 875–76.

[226] *See id.*

[227] *See id.* at 877.

[228] *See id.*

[229] *See* Ohio v. Denune, 612 N.E.2d 768, 774–75 (Ohio Ct. App. 1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[230] *See id.*

[231] *See* Annual Review, *supra* note 6, at 877–952.

[232] *See id.*

[233] *See id.*

environment a priority as Congress and state legislatures have already done.[234] However, one function of the judiciary is to check legislative attempts to infringe constitutionally protected rights.[235] A potential problem with expanding the exigent circumstances exception in the manner suggested is that such an expansion arguably involves placing environmental concerns over an individual's privacy interests.

Using the exigent circumstances exception to allow environmental investigators and police to enter premises where they have (1) requisite probable cause to search, and (2) a reasonable suspicion that imminent harm to the environment is threatened, however, is not an undue infringement on individual privacy interests. First, the searches upheld under these conditions would necessarily be *reasonable*—the probable cause and exigency requirements ensure that.[236] Both of these factors must be present before a court will uphold a warrantless search based on exigent circumstances.[237]

Even searches that satisfy both the probable cause and exigency requirements, moreover, will be scrutinized to determine whether the searches were narrow enough in scope.[238] Courts have made clear that the exigent circumstances exception will not be used to allow police to run rampant and directionless on private property.[239] Rather, when

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[234] *See* Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 876 (La. Ct. App. 1989); *see also supra* notes 179–85 and accompanying text.

[235] *See* GERARD GUNTHER ET AL., CONSTITUTIONAL LAW 2–20 (12th ed. 1991) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

[236] *See* Annual Review, *supra* note 6, at 909 ("To justify a warrantless search under the exigent circumstances exception, the police must demonstrate that the search was conducted in a reasonable manner."). Further, to be protectable, an individual's privacy interest must be reasonable. *See* New York v. Burger, 482 U.S. 691, 699–703 (1987). One could argue that stepping in the way of agents seeking to prevent an environmental catastrophe that threatens human health and safety is not reasonable. *See* David G. Gray, *"Then the Dog Died": The Fourth Amendment and Verification of the Chemical Weapons Convention*, 94 COLUM. L. REV. 567, 646 (1994).

[237] *See, e.g.*, Ohio v. Denune, 612 N.E.2d 768, 775 (Ohio Ct. App. 1992) (warrantless search invalid where officers failed to establish requisite probable cause or an "imminent" enough threat to constitute an exigency), *cert. denied*, ___ U.S. ___, 114 S. Ct. 289 (1993).

[238] *See, e.g.*, Annual Review, *supra* note 6, at 908 (noting warrantless searches for fleeing suspects only will be upheld on ground of exigency if their scopes are limited to preventing suspect from resisting arrest or from escaping).

[239] *See* Mincey v. Arizona, 437 U.S. 385, 393 (1978) (stating that a warrantless search must be "strictly circumscribed by the exigencies which justify its initiation"); Chambers v. Maroney, 399 U.S. 42, 61 (1970) (Harlan, J., concurring in part and dissenting in part) ("Where exceptions are made to accommodate the exigencies of particular situations, those exceptions must be no broader than necessitated by the circumstances presented."); Terry v. Ohio, 392 U.S. 1, 18–19 (1967) ("A search that is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. . . . The scope of the search must be strictly tied to

upholding searches based on exigent circumstances, courts have insisted that each search be narrowly limited to matters reasonably related to the exigent condition.[240]

Cases in which investigators are faced with a substantial threat to the environment, moreover, often will involve facilities that are subject to numerous environmental regulations. Participants in pervasively regulated industries cannot reasonably expect that their premises will be free from the periodic intrusions of inspectors. Thus, their privacy interests are less substantial than those of other citizens.[241] Both legislatures and courts have recognized that protecting the environment at the expense of these "lesser" privacy interests is not an illogical or unreasonable endeavor.[242]

Where the premises searched are not within a pervasively regulated industry, however, an individual's interest in privacy might arguably supersede the state's interest in protecting the environment. In such circumstances, one could contend that protecting non-human concerns at the expense of a constitutionally guaranteed right to privacy is absurd.[243]

However, there are two flaws in that argument. First, the argument assumes that the Fourth Amendment guarantees to all people a right to be free from *any* intrusions of privacy. The Fourth Amendment, however, does not articulate any explicit right of privacy.[244] Rather, the Fourth Amendment asserts a guarantee against "unreasonable" searches and seizures.[245] Any privacy interest derived from the Fourth

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and justified by the circumstances which rendered its initiation permissible."); Matter of Mullins & Pritchard, Inc., 549 So.2d 872, 877 (La. Ct. App. 1989) (praising a Louisiana statute authorizing warrantless entries made under exigent circumstances because the statute limited the scope of inspections to matters reasonably related to the exigent condition).

[240] *See supra* note 239 and accompanying text; *see, e.g.*, United States v. Echegoyen, 799 F.2d 1271, 1278–79 (9th Cir. 1986) (upholding a search narrowly tailored to the elimination of a fire hazard).

[241] *See* New York v. Burger, 482 U.S. 691, 699–703 (1987).

[242] *See id.*; *Mullins*, 549 So.2d at 876 (upholding a Louisiana statute authorizing warrantless inspections within a highly regulated oil-processing industry).

[243] *See* Gray, *supra* note 236, at 646 ("An imminent or inherent threat to public health or safety seems an appropriate basis on which to justify the limitation of Fourth Amendment rights. To maintain rigidly a privacy interest so as to thwart reasonable, necessary measures to safeguard human health and safety stretches (if it does not actively defy) human reason."). Accepting Gray's argument in this context requires acknowledgment that an imminent environmental catastrophe qualifies as a threat to human health or safety. *See infra* notes 248–55 and accompanying text.

[244] *See* U.S. CONSTITUTION, amend. IV.

[245] *Id.*

Amendment extends only so far as attempts to intrude on that interest are "unreasonable."[246] As noted above, the safeguards built into the exigent circumstances exception virtually guarantee that only those searches proven to be reasonable will be upheld.[247]

The second flaw in the argument is that it assumes that protection of the environment is a non-human concern, which should be "trumped" by the human interest in privacy. Protecting the environment, however, *is* a human concern.[248] Preserving the environment is in fact vital to the present and future health of the human race.[249]

Even though the relationship between environmental degradation and specific human health problems is difficult to prove, a general nexus between levels of pollution and human health seems indisputable.[250] Environmental pollution has been linked to such illnesses as lung cancer,[251] childhood leukemia,[252] and a variety of infections, skin disorders, gastrointestinal problems, genito-urinary problems, and cardiac problems.[253] Many of the harmful effects of toxic pollution, moreover, are not yet fully understood. Some toxic chemicals, once spilled, persist in the environment for years, even after attempts at remediation have been made.[254] The cost of remediating a toxic spill after a spill occurs, moreover, is usually staggering.[255]

Allowing authorities limited entry onto private property where such authorities reasonably believe environmental harm is imminent

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[246] *See* Terry v. Ohio, 392 U.S. 1, 9 (1967) (stating that Constitution does not forbid all searches and seizures, but only unreasonable searches and seizures); Mapp v. Ohio, 367 U.S. 643, 654 (1961) (describing Fourth Amendment as a constitutional documentation of the right to privacy from "unreasonable state intrusion"); Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against *arbitrary* intrusion by the police is at the core of the Fourth Amendment." (emphasis added)).

[247] *See supra* notes 236–42 and accompanying text.

[248] *See* PLATER, *supra* note 191, at 1034–39.

[249] *See id.*

[250] *See* John Forstrom, *Victim Without a Cause: The Missing Link Between Compensation and Toxic Tort Litigation*, 18 ENVTL. L. 151, 155–56 (1987); *see, e.g.*, PLATER, *supra* note 191, at 95–97, 193–95, 199–203, 760 (outlining links between human health problems and exposures to asbestos, the pesticide Paraquat, polluted drinking water, and polluted air).

[251] *See* PLATER, *supra* note 191, at 93–97 (detailing effects of asbestos exposure).

[252] *See id.* at 199–203 (discussing disorders caused by polluted drinking water).

[253] *See id.* at 760 (listing effects of polluted air).

[254] *See id.* at 930 (noting that EPA considers tendency of a chemical to bioaccumulate when identifying materials as "hazardous" under RCRA); *see also* Forstrom, *supra* note 250, at 156 (discussing human health risks associated with toxic substances in general); Starr, *supra* note 146, at 388 (discussing tendency of PCBs to bioaccumulate).

[255] *See* PLATER, *supra* note 191, at 896–97 (discussing cost of CERCLA cleanups).

is more than rational. Such proaction is essential to preserve the delicate ecosystem that sustains human life.[256] To enforce individual interests in privacy against reasonable attempts to prevent the imminent degradation of the environment is to risk the health and happiness of our successors selfishly and unnecessarily.[257] When balancing the well-being of future generations against a single individual's desire to secure personal property against every intrusion, no matter how reasonable, the only logical conclusion is that the former interest should prevail.

VII. Conclusion

Preventing harm to the environment has become a global concern. Congress and state legislatures already have taken steps to stop environmental degradation before serious damage occurs. The time has come for courts to follow suit. Recognizing imminent harm to the environment as an exigency sufficient to justify a warrantless entry onto private premises is a viable means by which the judicial branch might increase proactive protection of the environment.

Any search encompassed by the exigent circumstances exception must be supported by requisite probable cause and must be reasonable. Such safeguards guarantee that the expansion contemplated will pose no danger of undue infringement on constitutionally guaranteed privacy rights. Rather, expanding the exigent circumstances exception to include efforts to prevent imminent harm to the environment will allow investigators in a narrow range of circumstances to enter a premises for the limited purpose of forestalling imminent environmental harm. Considering the minimal intrusiveness of such entries, and the enormous clean-up costs, permanent environmental damage, and potential adverse effects on human health that could be prevented by allowing such entries, the only logical conclusion is that courts should add "harm to the environment" to the list of imminent dangers already recognized as exigencies justifying a warrantless search.

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[256] *See id.* at 1034–39.

[257] *See id.* at 1038–39 (discussing this idea under the title "The Common Heritage of Humankind").